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Supreme Court of the United States

OCTOBER TERM, 1944

NO. 537

GREAT AMERICAN INDEMNITY COMPANY,
Petitioner,

versus

LYMAN FLENIKEN, ET AL,
Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, and Brief in support thereof.

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HAUSER PRINTING CO., INC., NEW ORLEANS

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Supreme Court of the United States

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NO._____

GREAT AMERICAN INDEMNITY COMPANY,
Petitioner,

versus

LYMAN FLENIKEN, ET AL,
Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, and Brief in support thereof.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Great American Indemnity Company, defendant, prays that a writ of *certiorari* issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in the above entitled cause on May 25, 1944 (R. 42), reversing the judgment of the District Court for the Eastern District of Louisiana entered on July 23, 1943, (R. 14), and remanding the case to the Court for further proceedings not inconsistent with its opinion.

By stipulation (R. 1) the record on the former appeal in the case of Lyman Fleniken et al vs. Great American

Indemnity Co., No. 10,247 on the docket of the Circuit Court of Appeals for the Fifth Circuit, was made a part of this record but was not reprinted. This is the same record which was filed in this Honorable Court on April 16, 1943 in connection with the plaintiffs' (respondents herein) petition for certiorari, and which bears Docket No. 738 of the October, 1942 Term of this court. All references to the record in this petition are to the transcript of record filed in connection with the instant petition for *certiorari* unless otherwise noted.

STATEMENT

Lyman Fleniken and his wife, (hereinafter sometimes referred to as "respondents") filed suit in the District Court of the United States for the Eastern District of Louisiana, against Great American Indemnity Company, (hereinafter sometimes referred to as "petitioner") for damages caused by the alleged negligent operation of an automobile by a driver alleged to have been covered by a Non-Ownership Liability Insurance Policy issued by the petitioner to the Capital City Press. (References to proceedings affecting Third Parties are omitted.) On the trial of the case at the close of the introduction of all the evidence, petitioner moved for a directed verdict in its favor (R. 938 p. 228). This motion was denied and in accordance with Rule 50 (b) of the Rules of Civil Procedure, "the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion." The case was then submitted to the jury, a verdict in favor of respondents was returned and judgment in accordance therewith was entered (R. 938 p. 244). Thereupon, within the delay provided, petitioner filed a motion under Rule 50 (b) to have the verdict set aside and to have judgment entered

in its favor and against respondents in accordance with its prior motion for a directed verdict; and in the alternative, to set aside said verdict and grant a new trial of all the issues for the reason stated therein (R. 938 p. 245). Notice of the filing of this motion was given opposing counsel but a copy thereof was omitted from the printed record (R. 938 p. 246). Upon hearing thereof, the motion was denied except as to the excessiveness of the verdict (R. 938 p. 247). As to the latter the trial judge said that he would grant a new trial unless a *remittitur* was entered in the amounts suggested by him. Whereupon plaintiffs entered a *remittitur* and a new trial was denied and judgment in the reduced amounts was entered in favor of respondents. (R. 938 p. 251).

Petitioner appealed the case to the Circuit Court of Appeals for the Fifth Circuit, and assigned as reversible error the District Court's refusal to grant the motion for a directed verdict in favor of petitioner made at the close of all the evidence and renewed after entry of judgment as aforesaid. Upon the evidence adduced at the trial, the **Court of Appeals for the Fifth Circuit determined that as a matter of law the District Court had erred in not granting said motion.** The opinion rendered on February 1, 1943 in No. 10,247, reported in 134 F. 2d 208, decrees as follows:

> "The motion of defendant appellant (petitioner) for a verdict in its favor should have been granted. The judgment is reversed and the cause is remanded for further and not inconsistent proceedings." (Emphasis and parenthesis ours.)

On February 20, 1943, respondents filed a petition for a rehearing, which was denied on March 12, 1943. Respondents' petition for *certiorari* was filed in this Hon-

orable Court on April 16, 1943, and was denied on May 17, 1943. A petition for a rehearing on their petition for *certiorari* was denied on June 14, 1943. (See 319 U. S. 753, 87 L. Ed. 1706, 63 S. Ct. 1167).

On July 23, 1943, upon the motion of petitioner (R. 13) and in pursuance to the mandate of the Circuit Court of Appeals dated May 26, 1943 (R. 3) the Judge of the District Court signed an order setting aside and vacating the judgment of the District Court, as amended, and granting the petitioner's motion for a directed verdict (R. 14). Respondent, on August 20, 1943, filed a motion in the Circuit Court to recall the mandate previously issued and to grant a rehearing on the ground that the decision was not in accord with the established jurisprudence and latest expression of the Supreme Court of Louisiana in *LeBlanc v. New Amsterdam Casualty Co.*, 202 La. 857, 13 So. 2d 245 (1943). This motion was denied on August 25, 1943 and on October 8, 1943 respondents filed a motion in the District Court to set aside its judgment of July 23, 1943 (R. 15). After a hearing, the motion to set aside the judgment was denied on October 27, 1943 (R. 26).

Respondents appealed to the Circuit Court of Appeals and on May 25, 1944 that Court reversed the judgment of the District Court and remanded the cause to the latter Court "for further proceedings not inconsistent with this opinion." 142 F. 2d 938 (R. 45). Petitioner applied for a rehearing on June 12, 1944 (R. 47) and on August 24, 1944 the Circuit Court denied its petition (R. 50). On the application of petitioner the issuance of a mandate was stayed for a period of thirty days from September 4, 1944 (R. 53).

THE QUESTION PRESENTED

The question is whether respondents were entitled to notice and an opportunity to be heard upon the matter of entering judgment on the mandate; in other words, whether it was the ministerial duty of the District Judge, after receiving the mandate, to grant the motion of petitioner for a directed verdict and enter judgment without notice to the respondents.

STATEMENT OF JURISDICTION

(1) This Court has jurisdiction to consider and grant this petition pursuant to Judicial Code, Section 240, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A. Section 347 (a).

(2) The original date of the judgment to be reversed is May 25, 1944 (R. 42). The petition for rehearing was filed on June 12, 1944, within the time provided by the rules of the Circuit Court of Appeals (R. 47), and the petition for a rehearing was denied on August 24, 1944 (R. 50). The petition for *certiorari* was filed within the time prescribed by the Act of February 13, 1925, as amended, on which jurisdiction rests.

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

(1) In reversing the judgment of the District Court.

(2) In holding that the reversal on appeal of the final judgment of the District Court in No. 10,247 on the docket of the Circuit Court, (R. 5), and the remand of that cause for further and not inconsistent proceedings did not reinstate the motion of the petitioner for a directed verdict, and in the alternative, for a new trial, in view

of the Circuit Court's opinion that the said motion for a directed verdict should have been granted.

(3) In holding that it is within the discretion of the District Court to allow the said motion to be renewed and to rule on it.

(4) In holding that respondents were entitled to a hearing on the motion for judgment in accordance with the mandate and the Circuit Court's opinion that judgment for a directed verdict in favor of petitioner should have been granted so that respondents could present their objections to such procedure and ask for a trial *de novo*.

(5) In following the opinion in *Madden Furniture Company vs. Metropolitan Life Insurance Company*, 127 F. 2d 837 (5th Cir., 1942).

(6) In holding that the decision in *Roth vs. Hyer*, 142 F. 2d 227, (5th Cir. 1944) is applicable.

REASONS RELIED ON FOR GRANTING THE WRIT

(1) The decision is in conflict with a long line of decisions of this Court holding that when a case has been decided by an appellate court and remanded to the District Court, every question which was before the former court and which was disposed of by its decree is finally settled and determined; the District Court is bound by the decree and must carry it into execution according to the mandate.

Sibbald v. United States, 12 Pet. 488, 492, 9 L. Ed. 1167;

Clark v. Keith, 106 U. S. 464, 465 1 S. Ct. 568, 27 L. Ed. 302;

In re Washington, etc. R. Co., 140 U. S. 91, 11 S. Ct. 673, 35 L. ED. 339;

Gaines v. Rugg, 148 U. S. 228, 243, 13 S. Ct. 611 37 L. Ed. 432;

In re Sanford Fork & Tool Co., 160 U. S. 247, 255, 16 S. Ct. 291, 40 L. Ed. 414;

In re Potts, 166 U. S. 263, 267, 17 St. Ct. 520, 41 L. Ed. 994;

Illinois v. Illinois Central R. Co., 184 U. S. 77, 91, 92, 22 S. Ct. 300, 46 L. Ed. 440;

Ex parte Union Steamboat Co., 178 U. S. 317, 319, 20 S. Ct. 904, 44 L. Ed. 1084;

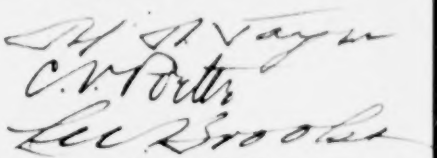
Kansas City Southern Ry. Co. vs Guardian Trust Co., 281 U. S. 1, 10, 11, 50 S. Ct. 194, 74 L. Ed. 659;

Sprague v. Ticonic National Bank, 307 U. S. 161, 168, 59 S. Ct. 777, 83 L. Ed. 1184.

(2) The decision of the Fifth Circuit Court of Appeals in this case and the decision of the same court in *Madden Furniture Company vs. Metropolitan Life Insurance Company*, 127 F. 2d 837, (5th Cir. 1942), *supra*, are in conflict with the decisions of the Circuit Court of Appeals for the Eighth Circuit in *Herzberg's Inc. vs. Ocean Accident & Guarantee Corp.*, 132 F. 2d 438 (1943), *Pike Rapids Power Company vs. Minneapolis, St. P. & S. S. M. Ry. Co.*, 106 F. 2d 891, 894 (1939) and *Carter vs. Thornton*, 109 F. 2d 316 (1940).

(3) It is highly important that Rule 50 (b) of the new Federal Rules be properly construed and applied. We contend that when the Circuit Court of Appeals held on the first hearing that "the motion of defendant appellant for a verdict in its favor should have been granted. The judgment is reversed and the cause is remanded for further and not inconsistent proceedings" (R. 13) it was the ministerial duty of the Judge of the District Court to enter judgment in favor of defendant (petitioner), and notice thereof to respondents was not necessary.

Wherefore, it is respectfully submitted that this petition for *certiorari* to review the judgment of the Circuit Court of Appeals for the Fifth Circuit should be granted.



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September 22, 1944
Brief follows:

Supreme Court of the United States

OCTOBER TERM, 1944

NO.————

GREAT AMERICAN INDEMNITY COMPANY,
Petitioner,

versus

LYMAN FLENIKEN, ET AL,
Respondents.

BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI

STATEMENT

This is an application for a writ of *certiorari* to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit reversing a judgment of the United States District Court for the Eastern District of Louisiana.

The material facts and the questions involved are set forth in the foregoing petition. The assignments of error there set forth are here adopted as a part of this brief.

THE DECISION BELOW

The opinion of the Circuit Court of Appeals (R. 42) is reported in 142 F. 2d 938.

STATEMENT OF JURISDICTION

The statement of jurisdiction set forth in the foregoing petition is here adopted as a part of this brief.

QUESTION PRESENTED

The question for decision is whether respondents were entitled to notice and an opportunity to be heard upon the matter of entering judgment on the mandate; in other words, whether it was the ministerial duty of the District Judge, after receiving the mandate, to grant the motion of the petitioner for a directed verdict and enter judgment without notice to the respondents.

CONTENTIONS OF PETITIONER

When the Circuit Court of Appeals held in the cause entitled "*Great American Indemnity Company, Appellant, vs. Lyman Fleniken, et al., Appellees*" No. 10,247 on its docket (R. 5) that the motion of Great American Indemnity Company for a directed verdict at the close of all the evidence was well founded and "the motion of defendant appellant for a verdict in its favor should have been granted. The judgment is reversed and the cause is remanded for further and not inconsistent proceedings." (R. 13), and issued its mandate on February 1, 1943 directing that the judgment of the District Court be and the same is reversed and that this cause be and is remanded to the District Court for further and not inconsistent proceedings (R. 4), the District Judge had no alternative but to render judgment granting the motion of defendant (petitioner) for a directed verdict. A motion, therefore, was unnecessary—the Judge should have entered judgment on his own motion.

The rule is stated thus in *Cyclopedia of Federal Procedure*, 2nd Edition Vol. 12, Section 6399:

"The further proceeding in the lower court on remand, ordinarily to be had on appropriate notice and motion, are controlled by the mandate, **which fixes the measure and limitations of the lower court's powers and discretion and imposes an obligation on that Court to do nothing contrary to its letter or spirit, as elucidated and explained by the opinion."** (Emphasis ours.)

We also quote from 3 *Am. Jur.*, Secs. 1236 and 1237, p. 732 et seq:

"Sec. 1236. Judgment in Conformity to Mandate:—

The lower court, upon remand of a case from a higher court, must obey the mandate or remittitur; and render judgment in conformity thereto; it has no authority to enter any judgment not in conformity with the order, or any judgment other than that directed or permitted by the reviewing court. Otherwise litigation would never be ended, and the supreme tribunal of the state would be shorn of authority over inferior tribunals. This is particularly true when the mandate or remittitur orders the entry of a specific judgment or a particular decree. When the merits of a case are determined on appeal, the trial court has no power but to obey the judgment of the appellate court. **Whatever comes before and is decided and disposed of by the reviewing court is considered as finally settled, and the inferior court to which a mandate issues is bound by the decree as the law of the case and must carry it into execution according to the mandate, without granting a new trial or taking additional evidence, except, perhaps, in cases where, by statute, a party is entitled to a new trial as a matter of right. Nor can new defenses existing at the date of the decree or judgment be heard in opposition."**

* * *

"Sec. 1237. Alteration, Modification, Amendment, etc., by Trial Court of Mandate:—

After reviewing court has determined a case before it and remanded such case to the lower court, the latter is without power to modify, alter, amend, set aside, or in any manner disturb or depart from the judgment of the reviewing court, even during the continuance of the term in which it was rendered. The judgment of the higher court is not reviewable in any way by the court below, in the exercise of its equitable powers, or otherwise. **The lower court cannot vary or examine the decree of the higher court for any other purpose than execution; give any other or further relief; review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded. It can only proceed to execute the mandate and settle so much as remains to be done without rescission or modification."** (Emphasis ours.)

The mandate "as elucidated and explained by the opinion," which was a part thereof, clearly instructed the District Judge to grant the petitioner's motion for a directed verdict, and he had no right to modify, amend or vary the judgment or depart from the appellate court's directions.

In the case of *Herzberg's Inc. v. Ocean Acc. & Guarantee Corporation*, 132 F. 2d 438 (C.C.A., 8th Cir., 1943) suit was brought by an insured against its insurer under a public liability policy. There was judgment in the District Court for plaintiff and the defendant appealed. There as here "The evidentiary facts were not in dispute and the only question for decision was whether the loss which plaintiff had sustained—which had been occasioned by the recovery of damages from it by a patron of its store for personal injuries caused by an electrical treat-

ment administered by a cosmetician in a beauty shop operated in the store—was excluded from the coverage of the policy by a malpractice endorsement." (In the case at bar "The evidence is without conflict" as found by the Circuit Court) (R.6). The District Court had ruled that the loss was not caused by malpractice within the meaning of the endorsement and had entered judgment in favor of the plaintiff with costs. The Circuit Court of Appeals held that the loss was excluded from the coverage of the policy by the malpractice endorsement. The concluding words in the opinion of the Circuit Court of Appeals are practically identical with the last sentence of the opinion of the Fifth Circuit Court in the case at bar. They are: "The judgment below is reversed and the cause remanded to the District Court for further proceedings not inconsistent herewith." (See 100 F. 2d 171, 173). Like the plaintiffs at bar, the plaintiff in that case applied to the Supreme Court of the United States for *certiorari*, but the application was denied. 306 U. S. 645, 59 S. Ct. 584, 83 L. Ed. 1044. The mandate of the Court of Appeals provided, in part, as follows:

> "' * * * it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that the Ocean Accident and Guarantee Corporation, Inc., a corporation, have and recover against Herzberg's, Inc., a corporation, the sum of Three Hundred Twenty-six and 30/100 Dollars for its costs in this behalf expended and have execution therefor.
>
> "'And it is further ordered by this Court that this cause be and the same is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court this day filed herein.'"

After the mandate went down to the District Court, the plaintiff moved that court for leave to file an amended complaint and for a new trial. The court granted leave to amend. Of this action the Court of Appeals said:

> "(1,3) A majority of this Court thinks that, while the opinion and mandate on the former appeal of this case did not specifically direct the entry of judgment in favor of the defendant, the effect of the mandate, of which the opinion was a part (*Pike Rapids Power Co. v. Minneapolis, St. P. & S. S. M. R. Co.*, 8 Cir., 106 F. 2d 891, 894), was to require that to be done, since every issue of law and fact raised by the pleadings had been decided, and nothing remained to be done except for the trial court to determine the costs that the defendant was entitled to recover and to enter judgment in favor of the defendant with costs. **The majority is of the opinion that the former decision of this Court terminated this case for all purposes; that thereafter the complaint was not subject to amendment without express leave from this Court** (compare, *International Ladies' Garment Workers' Union v. Donnelly Garment Co.*, 8 Cir., 121 F. 2d 561); and that if the amendment of the complaint had any effect at all, it constituted the commencement of a new and independent action, which, at the time the amendment was made, was barred by the statute of limitations of the State of Nebraska. **The majority regards the amendment to the complaint and the proceedings subsequent thereto as an ineffectual attempt to circumvent a decision of this Court which was completely determinative of this case. This is not a case like *Northern Pacific Ry. Co. v. Van Dusen Harrington Co., D. C.*, 34 F. 2d 786, 787, or *Millers' Mut. Fire Ins. Ass'n. of Illinois v. Bell*, 8 Cir., 99 F. 2d 289, 291, in which, after a judgment of a trial court had been reversed by this Court, issues of fact remained open and a new trial was in order.**

"(4,5) In *Thornton v. Carter*, 8 Cir., 109 F. 2d 316, 319, we pointed out that 'There can be no question of the right of an appellate court of the United States when it reverses a case, to direct the entry of the proper judgment or decree in the lower court and thus terminate the litigation upon the merits, (1) in an equity case; (2) in a jury-waived case submitted upon an agreed statement of facts; and (3) in a jury-waived case in which the trial court's findings of fact are sustained by the evidence and are complete, but its conclusions of law and judgment are erroneous.' "

"We also said in that case (109 F. 2d at page 320): 'A mandate is completely controlling as to all matters within its compass, but on remand the trial court is free to pass upon any issue which was not expressly or impliedly disposed of on appeal. Since, however, a final judgment upon the merits concludes the parties as to all issues which were or could have been decided (*Guettel v. United States*, 8 Cir., 95 F. 2d 229, 230, 118 A.L.R. 1060 and cases cited), it is obvious that such a judgment of this court on appeal puts all such issues out of the reach of the trial court on the remand of the case. **That court is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of this court deciding the case.** See *Goldwyn Pictures Corp. v. Howells Sales Co.*, 2 Cir., 287 F. 100, 102.' " (Emphasis ours.)

It will be noted that the Circuit Court of Appeals for the Fifth Circuit in reversing the judgment in this case on the first hearing (R. 13) not only used substantially the same language used in the cited case but in addition used this clear and precise language:

> "The motion of defendant appellant for a verdict in its favor should have been granted."

Hence the instant case is much stronger for the petitioner than the cited case was for the defendant.

In the case of *Pike Rapids Power Co. v. Minneapolis, St. P. & S. S. M. Ry. So., supra*, on the first appeal to the Circuit Court of Appeals, 8th Cir., 99 F. 2d 902, (1938) the Appellate Court issued a mandate reading "that the judgment of the said District Court in this cause, be, and the same is hereby reversed insofar as it relates to the liability and responsibility of the parties for damages to the defendant's two bridge piers resting on the east side of the middle of the Mississippi River, and in all other particulars the judgment is hereby affirmed". A second appeal to the Circuit Court of Appeals presented the single question as to whether the lower court entered judgment consistent with the opinion of the appellate court. In finding that the judgment appealed from had been entered in strict conformity with its mandate, the Circuit Court of Appeals said:

> "(1,2) It is the established rule of this court that following reversal with directions, proceedings in the lower court should conform to the mandate, of which the opinion is a part. *American Surety Co. v. Bankers' Savings & Loan Ass'n*, 8 Cir., 67 F. 2d 803; *Mortgage Loan Co. v. Livingston*, 8 Cir., 66 Fed. 2d 636; *H. P. Coffee Co. v. Reid, Murdoch & Co.*, 8 Cir., 60 F 2d 387. See, also: *Gulf Refining Co. vs. United States*, 269 U. S. 125, 46 S. Ct. 52, 70 L. Ed. 195; *City Nat. Bank v. Hunter*, 152 U. S. 512, 14 S. Ct. 675, 38 L. Ed 534; *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 16 S. Ct. 291, 40 L. Ed. 414; *Metropolitan Water Co. v. Kaw Valley Drainage Dist.*, 223 U. S. 519, 32 S. Ct. 246, 56 L. Ed. 533. * * *
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> * * *
>
> " * * * **The mandate of this court left nothing to the discretion of the lower court. It in effect**

performed a ministerial act in entering the judgment of this Court." (Emphasis ours.)

To support their contention that a new trial should have been granted under the mandate issued by the Court of Appeals for the Fifth Circuit, plaintiffs cited the following cases, viz: *Slocum vs New York Life Insurance Company*, 228 U. S. 364, 33 S. Ct. 523, 57 L. Ed. 879 (1913); *Shell Petroleum, Inc. vs. Shore*, 80 F. 2d 785 (C.C.A. 10th Cir., 1935); and *In re Aqua Systems, Inc.*, 90 F. 2d 538, decided by this Court in 1937. **All of these cases were decided before the adoption of the New Federal Rules and their holdings are no longer applicable,** for as stated in *Madden Furniture Co. vs. Metropolitan Life Insurance Co.*, 127 F. 2d 837, *supra*, the very purpose of Rule 50 (b) is to obviate the necessity for a new trial under circumstances as exist in the instant case. The latter case was also decided by the Court of Appeals for the Fifth Circuit and in it the Court pointed out that Rule 50 (b) of the Federal Rules of Civil Procedure was intended to obviate the necessity for a new trial whenever the trial judge finds that he has erroneously refused to direct a verdict. In the instant case the Fifth Circuit Court found that the District Judge erroneously refused to direct a verdict for the defendant at the conclusion of all the evidence. Hence, there is no necessity for a new trial.

The distinction between the case at bar and the *Madden Case* is that in the latter case it was specifically pointed out that the judgment of the District Court with reference to the motion for judgment *non obstante veredicto* was not considered, but the errors passed upon involved matters prior to the verdict, namely the exclusion of evidence that should have been admitted, and the judge's charge to the jury, and therefore a new trial ought to have been had. **Here, there was no question as to the court's ruling on ad-**

missibility of evidence, or as to the correctness of his charge to the jury. The refusal of the Trial Judge to grant the motion for a directed verdict and later his refusal to grant defendant's motion for a judgment *non obstante veredicto* was the very issue decided by the Court of Appeals and which held that "the motion of defendant appellant for a verdict in its favor should have been granted". There is no need for a new trial of the issues involved in plaintiffs' claim—they are closed.

There being no occasion for a new trial or amendment of pleadings, there was no necessity for notice before entry of judgment herein. It was so held in *Carter v. Thornton*, 109 F. 2d 316 (C.C.A., 8th Cir., 1940). That case involved a contest over the proceeds of a life insurance policy deposited in court by an insurer between the named beneficiary, Mrs. Wilma I. Carter, and the allegedly substituted beneficiary, John T. Thornton. The sole question presented by the appeal to the Circuit Court of Appeals, was whether a certain document effected a change of beneficiary, or was an assignment which the policy prohibited. The conclusion reached by the Appellate Court was that the instrument did not change the beneficiary, but was an attempt to transfer a security interest in the policy, which being in violation of the terms of the policy, could not be given effect as against the beneficiary. The judgment in the District Court had been for Thornton; Mrs. Carter had appealed. The opinion of the Circuit Court of Appeals provided:

> "The judgment appealed from is reversed and the case remanded with directions to enter a decree in favor of appellant."

Thornton applied for a rehearing which was denied. The mandate of the Court of Appeals went down and was received by the District Court on February 18, 1938.

No decree for Mrs. Carter was entered then. On September 19, 1938, the District Court granted leave to Thornton to file a supplemental answer which challenged the correctness of the decision of the Appellate Court and prayed for judgment notwithstanding its mandate. Mrs. Carter moved to dismiss this answer and an order dismissing the supplemental answer was entered on Feb. 9, 1939. On Feb. 14, 1939, Mrs. Carter moved for judgment on the mandate. She asked that the decree required by the mandate be entered, and for judgment against Thornton for the $123.20 which the Insurance Company had been allowed to withdraw from the fund deposited by it. She also asked for interest on the money withdrawn from the registry of the Court by Thornton. Thornton filed an answer to this motion, asserting, among other things, that Mrs. Carter was not entitled to any judgment. A judgment was entered on April 4, 1939, providing, among other things, that the $123.20 allowed the Insurance Company should be borne one-half by Thornton and one-half by Mrs. Carter; that Mrs. Carter should have judgment against Thornton for $2438.40 less certain credits, the amount to bear 6% per annum interest from February 9, 1939. Thornton appealed, contending that his supplemental answer should not have been dismissed, but should have been sustained and the court should have denied Mrs. Carter any decree.

In addition to what has already been quoted by the Court in *Herzberg's Inc. v. Ocean Acc. & Guarantee Corporation, supra*, the Court said on the second appeal (109 F. 2d 316, 319):

> "(2,3) When a case has been decided by this court on appeal and remanded to the District Court, every question which was before this court and disposed of by its decree is finally settled and determined. The District Court is bound by the decree and must carry it into execution accord-

ing to the mandate. It cannot alter it, examine it except for purposes of execution, or give any further or other relief or review it for apparent error with respect to any question decided on appeal, and can only enter a judgment or decree in strict compliance with the opinion and mandate."

In support of this principle the court cited the following cases:

Sibbald v. United States, 12 Pet. 488, 492, 9 L. Ed. 1167;
Clark v. Keith, 106, U. S. 464, 465, 1 S. Ct. 568, 27 L. Ed. 302;
In re Washington, etc. R. Co., 140 U. S. 91, 11 S. Ct. 673, 35 L. Ed. 339;
Gaines v. Rugg, 148 U. S. 228, 243, 13 S. Ct. 611 37 L. Ed. 432;
In re Sanford Fork & Tool Co., 160 U. S. 247, 255, 16 S. Ct. 291, 40 L. Ed. 414;
In re Potts, 166 U. S. 263, 267, 17 St. Ct. 520, 41 L. Ed. 994;
Illinois v. Illinois Central R. Co., 184 U. S. 77, 91, 92, 22 S. Ct. 300, 46 L. Ed. 440;
Ex parte Union Steamboat Co., 178 U. S. 317, 319, 20 S. Ct. 904, 44 L. Ed. 1084;
Kansas City Southern Ry. Co. vs Guardian Trust Co., 281 U. S. 1, 10, 11, 50 S. Ct. 194, 74 L. Ed. 659;
Sprague v. Ticonic National Bank, 307 U. S. 161, 168, 59 S. Ct. 777, 83 L. Ed. 1184.
Ruggles v. Buckley, 6 Cir., 192 F. 907, 909;
Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co., 6 Cir., 72 F. 545, 560;
D'Arcy v. Jackson Cushion Spring Co., 6 Cir., 212 F. 889, 891;
Williams v. Ansehl, 8 Cir., 279 F. 550, 551;
Mortgage Loan Co. v. Livingston, 8 Cir., 66 F. 2d 636, 640;
Flowers vs United States, 8 Cir., 86 F 2d 79, 80, 81;

Pocono Rubber Cloth Co. v. J. A. Livingston, Inc., 3 Cir. 82 F. 2d 290, 291;

Goldwyn Pictures Corp. v. Howells Sales Co., Inc., 2 Cir., 287 F. 100, 102.

The Court said further:

"(9-12) As we have already pointed out, Mrs. Carter, on February 18, 1938, was entitled to a decree which would give to her the same relief which was awarded to Thornton under the decree which had been reversed. The decree in favor of Thornton gave him the equivalent of $2,500 ($2,376.80 of the deposit, and $123.20 judgment against Mrs. Carter) and his costs. Therefore, if the court below had on February 18, 1938, entered a decree in favor of Mrs. Carter and against Thornton for $2,500 and her costs, it would have complied with the mandate of this court. This decree, however, was not entered. It is now apparent that Thornton has the fund which was deposited and has had it since the fall of 1936. Mrs. Carter contends that she ought to have interest on her money which Thornton has had from the time that he obtained it from the registry of the court. The matter of interest up to the time that the first appeal was ended was, we think, a question which could have been, and therefore should have been, presented to this court in connection with that appeal, and it is not a matter which can now be considered by the court below or by this court. The question of Mrs. Carter's right to interest upon the decree which should have been entered at the time the District Court received our mandate stands in a different situation. **Mrs. Carter was entitled to have the decree entered without any application or motion on her part. Our mandate required of the District Court the doing of a purely ministerial or clerical act.** *Pike Rapids Power Co. v. Minneapolis, St. Paul, etc. Ry. Co.*, 8 Cir., 106 F. 2d 891, 894. It was through

> no fault of Mrs. Carter that the decree was not entered on the day our mandate was received. We regard that as done which should have been done. It is our opinion that on February 18, 1938, by virtue of our mandate, Mrs. Carter became legally entitled to recover the fund which Thornton had withdrawn from the registry of the court and to have judgment against him for the $123.20 costs and expenses of the insurance company and for her costs, and that on that day he became legally obligated to restore the fund to her and to pay her, in addition, $123.20 and her costs. We hold that Mrs. Carter was entitled to six per cent interest on the amount which Thornton was obligated to pay her from February 18, 1938." (Emphasis ours.)

The Court of Appeals for the Fifth Circuit also held (R. 44) that when the case was remanded to the District Court with instructions that the motion for a directed verdict should have been maintained, this did not reinstate the motion of petitioner for a directed verdict and in the alternative for a new trial, which motion had been overruled before an appeal was taken, saying "It was within the discretion of the Court below to allow that motion to be renewed and to rule on it but this should not have been done without giving the parties a hearing. The plaintiff was entitled to present his objections to such procedure and to ask for a trial *de novo*." In support of this holding, the Court cited *Madden Furniture Company vs. Metropolitan Life Insurance Company*, 127 F. 2d 837, and *Roth vs. Hyer*, 142 F. 2d 227, both decided by the Fifth Circuit Court.

We submit that the decision in *Metropolitan Life Insurance Company vs. Madden Furniture Company, supra*, is not pertinent because the alleged errors occurred **prior** to the verdict, whereas in this case the Court of Appeals held that the plaintiffs were not entitled to recover of the

defendant (petitioner) on the evidence adduced, saying, "upon the undisputed facts, the insurer was not liable as a matter of law." (R. 43). In the *Madden case* the District Judge excluded certain evidence which the appellate court held should have been admitted. Also the appellate court held that the District Judge erred in his charge to the jury. No such errors occurred in the *Fleniken* case. The petitioner contended that **as a matter of law** respondents were not entitled to recover on the insurance policy under the evidence adduced and this contention was upheld by the appellate court on its first hearing. (R. 5).

Roth vs. Hyer, 142 F. 2d 227, *supra,* was tried to the court without a jury. The plaintiff appealed from a judgment in defendant's favor. The Court of Appeal for the Fifth Circuit on the first appeal held that "The judgment was wrong and must be reversed for further and not inconsistent proceedings." (133 F. 2d 5, 9). The Court did not hold, however, that the District Judge should have directed verdict in favor of the mover as it held in this case. In the *Roth case* the appellate court recognized that it "could have made a final adjudication of the issue of liability on the record before it, and ordered that only the amount of damages be tried," but in the second appeal that Court said that it "did not do that, but reversed and annulled the only judgment there was and ordered further consistent proceedings." If the Appellate Court had merely reversed and remanded this case for further proceedings not inconsistent with its opinion instead of instructing the trial judge to direct verdict in favor of the defendant (petitioner), then we agree that the *Roth case* would be applicable, but in view of the foregoing we submit that the decision is not apropos.

In discussing motions under rule 50(b), it is stated in *Moore's Federal Practice*, 1943 Supp. to Vol. 3, page 97:

> "Undoubtedly where defendant has unsuccessfully moved for judgment n. o. v. after the adverse verdict, the appellate court has the right and duty, on finding the verdict unsupported, to order judgment n. o. v. or dismissal on the merits, rather than a new trial, and plaintiff is not thereby deprived of the right of jury trial."

In the footnotes the text writer cites *Brunet v. S. S. Kresge Co.*, 7th Cir., 115 F. (2) 713, cert. den. 61 S. Ct. 1102; *Great Northern Life Ins. Co. v. Vince*, 6th Cir., 118 F. (2d) 232, and *Brennan v. Baltimore & Ohio R. Co.*, 2d Cir., 115 F. (2d) 555, cert. den. 61 S. Ct. 614.

We submit that the recent decision of this Court in *Montgomery Ward and Co. v. Duncan*, 311 U. S. 243, 85 L. Ed. 147, construing rule 50(b) is peculiarly applicable. We quote:

> "**Each motion, as the rule recognizes, has its own office. The motion for judgment cannot be granted unless, as matter of law, the opponent of the movant failed to make a case and, therefore, a verdict in movant's favor should have been directed.** The motion for a new trial may invoke the discretion of the court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury."
>
> * * *
>
> "The rule contemplates that either party to the action is entitled to the trial judge's decision on both motions, if both are presented. A decision

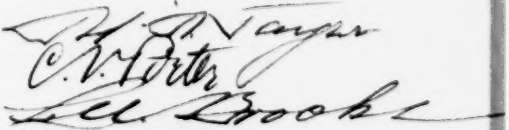
in favor of the moving party upon the motion for judgment ends the litigation and often makes it possible for an appellate court to dispose of the case without remanding it for a new trial."

(Emphasis ours.)

SUMMARY

In an effort to comply with rule 38 (2) of this Court requiring conciseness in the supporting brief, petitioner has not advanced all of the arguments which will be urged if this petition is granted. Petitioner believes and strongly urges that the Court of Appeals for the Fifth Circuit erred in reversing the judgment of the District Court in deciding that when the Fifth Circuit Court held that the petitioner's motion for a directed verdict should have been granted and remanded the case to the District Court for further proceedings not inconsistent with its opinion that this meant that "It was within the discretion of the court below to allow that motion to be renewed and to rule on it, but this should not have been done without giving the parties a hearing. The plaintiff was entitled to present his objections to such procedure and to ask for a trial *de novo*." (R. 44).

Respectfully submitted,



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 537

GREAT AMERICAN INDEMNITY COMPANY,
Petitioner,

versus

LYMAN FLENIKEN, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS, LYMAN FLENIKEN AND MRS. LYMAN FLENIKEN

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BRIEF FOR RESPONDENTS, LYMAN FLENIKEN AND MRS. LYMAN FLENIKEN

STATEMENT

The statement set out in the petition for the Writ of Certiorari is substantially correct. We call attention, however, to the fact that the petition states that the Judge of the District Court entered judgment on July 23, 1943, "in pursuance to the mandate of the Circuit Court of Appeals dated May 26, 1943." It is the position of respondents that the mandate of the Circuit Court of Appeals did not direct the entry of the judgment entered by the District Court on July 23, 1943. It is upon this issue that petitioner is asking this Court to take jurisdiction.

THE QUESTION PRESENTED

The sole question is whether respondents were entitled to notice and an opportunity to be heard upon the matter of the District Court entering judgment on the mandate.

ARGUMENT

After the mandate of the Circuit Court of Appeals in the case entitled Great American Indemnity Company, Appellant, vs. Lyman Fleniken, et al, Appellees, No. 10247 on its docket (R. 3), was received by the District Court, petitioner here, appellant in that cause, filed a motion in the District Court to set aside the judgment entered on December 4, 1941, and praying for entry of a judgment in its favor "in accordance with the instructions contained in the opinion of the United States Circuit Court of Appeals" (R. 13).

It is admitted that no notice was given to respondents of the filing of this motion for judgment or of the entry of the judgment.

The failure to give notice is a violation of Rule 6 (d) of the Rules of Civil Procedure which provides for the giving of notice of hearing on a written motion not later than five days before the time allowed for the hearing. It violates Rule 5 (a) of the Rules which requires every pleading subsequent to the original complaint to be served on parties affected thereby and it violates Rule 55 (b) of the Rules which provides that a default judgment shall not be entered against a party who has appeared in the action until he shall be served with written notice of the application for judgment at least three days prior to the hearing on such application.

Petitioner seeks to avoid its failure to comply with these

rules on the ground that the mandate of the Circuit Court of Appeals directed and commanded the District Court to enter judgment for it and that the entry of judgment for it was a ministerial duty which should have been performed by the District Court without application on the part of petitioner. Therefore, if the mandate of the Circuit Court of Appeals sent down in Cause No. 10,247 did not direct and command the District Court to enter the judgment entered by it, so that the entry of judgment was nothing more than a ministerial duty, all contentions of petitioner must fail and there is no error in the judgment which the petitioner seeks to have reviewed.

The mandate of the Circuit Court of Appeals on its face did not direct entry of judgment for petitioner.

It reads (R. 4):

> "On Consideration Whereof, It is now here Ordered and Adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further and not inconsistent proceedings;"

The opinion of the Circuit Court of Appeals contained the following wording:

> "The motion of defendant appellant for a verdict in its favor should have been granted. The judgment is reversed and the cause is remanded for further and not inconsistent proceedings." (R. 13).

Petitioner contends that, in view of the court's finding that the motion for a directed verdict should have been granted, the mandate must be considered as a direction to the District Court to enter judgment for the petitioner.

The Court of Appeals, however, which issued the mandate, stated in the opinion, sought to be here reviewed, that it was not that court's purpose and intent to direct the District Court to enter judgment on the motion for directed verdict but that it was remanded to the District Court for such proceedings as it thought proper and not in conflict with the finding of the Appellate Court.

It would seem that any question as to the intent of the mandate would be put at rest by this declaration by the Court which issued the mandate.

However, petitioner insists that, regardless of the purposes and intent of the Court of Appeals which wrote the mandate, because of the wording in the opinion, the mandate must be construed as an order to the District Court to enter judgment and the District Court must do so as a ministerial duty.

In support of their contention they rely upon three cases, *Herzberg's, Inc. vs. Ocean Acc. & Guarantee Corporation*, 132 Fed. 2d 438; *Pike Rapids Power Company vs. Minneapolis St. P. and S. S. M. Ry. Co.*, 106 Fed. 2d 891, and *Carter vs. Thornton*, 109 Fed. 2d 316.

We submit that nothing said in these three cases supports petitioner's contention that under the mandate the District Court was required to enter judgment for petitioner as a ministerial duty.

In the *Herzberg* case, *supra*, the sole question on appeal was whether or not a loss was covered by the terms of an insurance policy. The case was reversed upon a mandate similar to the wording of the mandate at bar. The lower court permitted a new petition to be filed seeking to reform the contract and tried that case. A majority of the Circuit Court of Appeals

were of the opinion on the second appeal that the effect of the opinion and mandate on the first appeal was to require the entry of a judgment for the defendant because *"every issue of law and fact raised by the pleading had then been tried."* (Emphasis ours.) However, that court was of the opinion that the mandate was not sufficiently definite even under the facts in that case and reviewed the case on its merits.

The *Herzberg* case merely holds that a court is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion deciding the case. It does not rule that the trial court was required to enter judgment as a ministerial act even though it might appear that the law upon which the Appellate Court passed had been changed or that the plaintiff upon a new trial might easily make proof of matters held necessary to establish his case. There is certainly nothing in the case to sustain petitioner's contention that Respondents were not entitled to notice of the entry of judgment.

The *Pike Rapids Power Company* case, *supra,* is not in point. On the first appeal of that case, a condemnation proceeding, the Appellate Court allowed damages to the land owner which were rejected by the trial court and reversed the judgment in part and affirmed it in part. The question on the second appeal was whether or not the trial court violated the mandate in the entry of judgment and the court held that it had not. The question of the right of the Appellate Court to grant a new trial when it finds the verdict unsupported by the evidence was not involved and the case affords petitioner no authority for its contention.

The *Carter* case, *supra,* is entirely distinguishable because there the Appellate Court in the mandate gave directions to

enter a decree in favor of appellant. In that case the opinion said:

> "The judgment appealed from is reversed and the case remanded *with directions to enter a decree in favor of appellant.*" (Emphasis ours.)

On January 12, 1938, a decree in that form was entered in the Appellate Court. 109 Fed. 2d, 1. c. 318.

The Appellate Court having remanded the case with specific directions to enter a specific decree which was found and entered above, the trial court was in an entirely different position than in this case where the cause was remanded for proceedings not inconsistent with the decision of the Appellate Court. But in that case the Court for the 8th Circuit again announced the rule that on remand the trial court is free to pass upon any issue which is not expressly or impliedly disposed of on appeal.

We respectfully urge that there is nothing in the three cases cited by petitioner to support its contention that the mandate at bar directed entry of judgment for petitioner as a ministerial act and without any notice to Respondents of the action taken on the mandate.

The Appellate Court having ruled against Respondents on the law, although it might have done so **did not preclude them from having a new trial if in the opinion of the District Court it should be given.** In any event Respondents were entitled to notice of the motion and the entry of any judgment.

The only way the petitioner can hope to support its contention in view of the Court of Appeal's ruling upon its own mandate, is that under the present rules of Civil Procedure an appellate court is helpless and without authority to grant

a new trial in any case in which it finds the evidence before it is insufficient to support the verdict. That would mean that the Appellate Court **would be required to direct a verdict** against the plaintiff in every case in which there might be found a failure of some technical proof, such as, failure to prove death was the direct result of the alleged negligent act or failure to introduce in evidence the note sued upon, even though the record might disclose that such proof could easily and readily be made upon another trial. We do not believe that even petitioner would go so far as to urge that in every case which is reversed for lack of evidence to support the verdict, the Appellate Court **is bound** to direct entry of judgment for the defendant. But unless that is the law the writ in this case must be denied.

Prior to the adoption of Rule 50, Rules of Civil Procedure, after a verdict was rendered, neither the trial court nor the appellate court could direct a verdict for the defendant. A new trial was mandatory when a judgment was reversed for failure of evidence to support it. Under Rule 50 the motion for directed verdict is saved and may be acted upon after a verdict is rendered. The rule in part provides "If a verdict was returned the court may allow the judgment to stand or may reopen the judgment **and either order a new trial** or direct the entry of judgment as if the requested verdict had been directed." (Emphasis ours.)

Under the present rule it is therefore held that when a judgment is reversed by the Appellate Court for lack of evidence that either the Appellate Court or the trial court may then enter judgment as though the requested verdict had been directed. Petitioner would seek to have this rule so construed **as to require** the court to grant the requested directed verdict whenever for any reason a verdict is set aside as not being

supported by the evidence. That certainly is not to be found in the language of the rule and we submit cannot and should not be implied. The purpose of the rules is to aid in rendering justice. Such a construction would defeat the purpose of the rules.

Rule 59, Rules of Civil Procedure, providing for new trials, provides that a new trial may be granted ". . . for any of the reasons for which new trials have heretofore been granted in actions at law in any of the courts of the United States. . . ." Failure of the proof to support a verdict was a cause for granting a new trial prior to the adoption of Rules 50 and 59, and we submit that courts have not been denied the right to grant a new trial for that reason under the new rules. Under Rule 50 the court **may** direct a verdict but **it is not required** to do so if it believes that a new trial would be in the best interest of justice.

It is a general rule that a verdict will not be directed but a new trial will be granted if it appears that the ends of justice would best be served by such a course. 5 C. J. S., Appeal and Error, Sec. 1933, Page 1445, and 3 Am. Jur., Appeal and Error, Section 1204, Page 707.

The rule is stated in Am. Jur. as follows:

> "A reviewing court possessing authority to render final judgment or direct the trial court to do so may render final judgment on the reversal of a judgment for the plaintiff on the ground of insufficiency of the evidence to support it, and will exercise this power if the evidence is manifestly insufficient, and it does not appear that any new evidence can be procured on a retrial of the cause. But if the court is of the opinion that other evidence may be produced on a new trial, or is unable to say that such evidence may not be produced, it will not

render final judgment, but will remand the case for a new trial."

The case having been remanded to the District Court for its action Respondents were entitled to notice before action was taken and judgment entered under the provisions of Rules 6 (d), 5 (a) and 55 (b), Rules of Civil Procedure. Petitioner has been able to cite no case in which it was ruled that the opposite party is not entitled to notice of the entry of judgment after a prior judgment has been reversed on appeal.

There are many reasons for the rules providing for notice. Each case may present a different ground requiring notice to the opposite party of an entry of a judgment in order that justice may be done. As pointed out in the opinion sought to be reviewed there is in this case an outstanding reason why Respondents were entitled to notice of the motion for entry of judgment on the mandate. When this case was considered by the Fifth Circuit Court of Appeals on the first appeal, No. 10247 on the docket of that Court, the sole and only question passed upon by the Court was whether Ewell and Neyland were employees of Capital City Press. The Court stated that " . . . recovery depended upon whether a case of liability against the Press was made out". (R. 5).

But subsequent to the hearing of this case on the first appeal by the Circuit Court of Appeals the Supreme Court of Louisiana declared the law of Louisiana to be such that petitioner under the terms of its policy would be liable **as insurer of Ewell,** and, therefore, liable regardless of whether or not Ewell was a servant of the Press. This law was announced in *LeBlanc vs. New Amsterdam Casualty Company,* 13 So. 2d 245. The opinion of the Circuit Court of Appeals, which petitioner asks Your Honors to review, mentions this *Leblanc* case (R.

42). Had that case been decided and called to the attention of the Court of Appeals it would have been compelled to affirm the original judgment, because under the *LeBlanc* case, petitioner under the terms of its policy is the insurer of Ewell and proof of master and servant is unnecessary.

The state law is controlling even though it is declared or altered after judgment in a District Court and at any time before the case is finally disposed of. *Huddleston vs. Dwyer,* — U. S. ———, 88 Law Edition (Advance Sheet No. 15) page 933, 64 S. Ct. Reporter, 1015 (not yet reported in bound volume). The case having been remanded by the Court of Appeals for further proceedings was still sub judice and the duty rested upon the Federal Court to apply the state law in accordance with the controlling decision of the highest court of the state in existence at the time the last federal court passed upon the case. The state law applicable to this case having been declared contrary to the declaration made by the Court of Appeals and after the Court of Appeals had remanded the case, the District Court is compelled to follow the law as declared by the state court and not as declared by the Court of Appeals. Therefore, any action taken by the District Court after the decision of the *LeBlanc* case must be in conformity therewith. If after the case was remanded to the District Court action taken by the District Court was in conformity with the *LeBlanc* opinion, the court could not be said to be acting inconsistent with the mandate because the District Court is now bound by the law as declared by the state which is contrary to the construction placed upon it by the Court of Appeals prior to the declaration of the state court.

This rule has very recently been clearly stated by this Court in the *Huddleston* case *supra,* 88 Law Edition, 1. c. 935, where this Court said:

"State law is the controlling rule of decision in this case as to both substantive and procedural rights of the parties. Erie R. Co. v. Tompkins, 304 US 64, 82 L ed 1188, 58 S Ct 817, 114 ALR 1487, Federal Rules of Civil Procedure, Rules 69 (a), 81 (b), 28 USCA following Para. 723 (c), 8 FCA 1937 ed title 28, Appx 3, pp 741, 747. It is the duty of the federal appellate courts, as well as the trial court, to ascertain and apply the state law where, as in this case, it controls decision. Meredith v. Winter Haven, 320 US 228, ante 1, 64 S Ct 7. And a judgment of a federal court ruled by state law and correctly applying that law as authoritatively declared by the state courts when the judgment was rendered, must be reversed on appellate review if in the meantime the state courts have disapproved of their former rulings and adopted different ones. 'Until such time as the case is no longer subjudice, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court.' Vandenbark v. Owens-Illinois Glass Co. 311 US 538, 543, 85 L ed 327, 330, 61 S Ct 347."

In view of the decision of the *LeBlanc* case, *supra*, and the *Huddleston* case, *supra*, it would now be proper when the case is called before the District Court for that Court to re-enter the judgment for plaintiff, because the same is now authorized under the law of the State of Louisiana as declared in the *LeBlanc* case. Such action would not be in conflict with or in violation of the decision of the Court of Appeals which was rendered prior to the declaration of the Louisiana law in the *LeBlanc* case.

In any event Respondents were entitled to present the *LeBlanc* case to the District Court for the purpose of having it determine the effect of the *LeBlanc* case upon the case at bar before it entered judgment in this case. As stated by the Court of Appeals Respondents were entitled to notice before judgment was entered in order that they might have the opportu-

nity to present this matter to the Court. This case demonstrates the value and reason for the Rules of Civil Procedure requiring notice before a motion is acted upon or judgment entered.

For the foregoing reasons we respectfully urge: that there is no error in the judgment of the Court of Appeals sought to be reviewed; that Respondents were, as found by the Court of Appeals, entitled to notice and an opportunity to be heard upon the matter of entering judgment upon the mandate of the Court of Appeals. The only way that error can be found in the decision of the Court of Appeals is to hold that under the Rules of Civil Procedure an Appellate Court is never, *under any circumstances,* empowered to grant a new trial when it finds that the verdict is not supported by the evidence, but that in such event judgment must be automatically entered for the defendant. Such, we submit, is not the provision of the Rules. Such constructions would hamper and retard the free administration of justice and defeat the prime purpose of the Rules of Civil Procedure.

We respectfully submit that the writ should be denied.

Respectfully submitted,

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Of Counsel

HAUSER PRINTING CO., INC., NEW ORLEANS

Supreme Court of the United States

OCTOBER TERM, 1944

No. 537

GREAT AMERICAN INDEMNITY COMPANY,
Petitioner,

versus

LYMAN FLENIKEN, Et Al.,
Respondents.

FIRST SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONERS.

May It Please the Court:

Learned counsel for the respondents make the following statement on pages 9 and 10 of their brief in opposition to the petition of Great American Indemnity Company for a writ of certiorari, viz:

> "But subsequent to the hearing of this case on the first appeal by the Circuit Court of Appeals the Supreme Court of Louisiana declared the law of Louisiana to be such that petitioner under the terms of its policy would be liable as insurer of Ewell, and, therefore, liable regardless of whether or not Ewell was a servant of the Press. This law was announced in *LeBlanc vs. New Amsterdam Casualty Company*, 13 So. 2d 245. The opinion of the Circuit Court of Appeals, which petitioner asks Your Honors to review, mentions this *LeBlanc* case (R. 42). Had that case been decided and called to

> the attention of the Court of Appeals it would have been compelled to affirm the original judgment, because under the *LeBlanc case*, petitioner under the terms of its policy is the insurer of Ewell and proof of master and servant is unnecessary."

In reply we wish to state that the LeBlanc case was called to the attention of the Court of Appeals in respondents' motion to recall the mandate and grant a rehearing and the brief in support thereof, filed in the Circuit Court of Appeals for the Fifth Circuit on August 20, 1943 in No. 10,247 on its docket; in fact it was urged in the said motion and petition for a rehearing that because of the decision in the *LeBlanc case* a rehearing must be granted in the said appeal. Practically the same reasons (although in greater detail) that are now being urged in respondents' brief in connection with the *LeBlanc case* were urged in the said motion and application. The Fifth Circuit Court *denied* the motion and declined to reopen the case.

We submit that the Fifth Circuit Court of Appeals was correct in its refusal to reopen the case following the LeBlanc decision for these reasons:

(1) In the *LeBlanc Case*, counsel for the defendant conceded that the "accident was caused partly, if not entirely, by the negligence of Philip LeBlanc, plaintiff's husband, and that at the time of the accident, he was using his own automobile on the business of H. T. Cottam and Co., his employer." 13 So. (2d) 246. No such concession has been made by the defendant in this case, and the Fifth Circuit Court held that Ewell, the owner of the truck involved in this accident, was an **independent contractor** and was not an agent or servant of Capital City Press, defendant's assured, in the discharge of his duties at the time of the accident.

(2) The Supreme Court of Louisiana held that H. T. Cottam and Company had the power to exercise supervision and control over LeBlanc in connection with the operation of his automobile under its contract of employment with him, when the automobile was driven by him in the course and scope of his employment stating that "a mere reading of the contract will show that the Cottam Company had the right to control LeBlanc's every activity in connection with his employment. He was required to devote his entire time to his employer's business, subject to the direction and the rules and regulations of his employer." 13 So. (2d) 246, 247. Capital City Press neither had the right to control, nor controlled, the action of Ewell or of Neyland, the driver of Ewell's truck. Moreover, Ewell did not devote his entire time to the business of distributing newspapers, but in addition he distributed, by means of his automobile, bread baked by Wolf's Bakery, collected and delivered laundry for a local dry cleaning establishment, and occasionally delivered articles of merchandise for individual customers, all independent of any control by Capital City Press. Truly, he was an independent contractor.

(3) The policy in the *LeBlanc Case* was a "National Standard Automobile Liability Policy" with the "Employers' Non-Ownership Liability Rider" attached, whereas, the policy sued upon in the case at bar was a "Non-Ownership Automobile Policy" with schedule annexed. There are many different provisions in the two policies and the coverage is quite different.

We will not attempt to analyze fully the two policies but will content ourselves with pointing out only a few differences:

(a) In the National Standard Automobile Liability Policy involved in the *LeBlanc Case* the insurer agreed

under Coverage A "To pay on behalf of the **insured** all sums which the **insured** shall become obligated to pay by reason of the liability imposed upon him by law for damages * * *." In the case at bar the insurer agreed "to PAY all sums which the **Named Assured** shall become liable to pay as damages imposed by law * * *." **The named assured in the instant case is Capital City Press.** (Emphasis ours).

The word "insured" is not qualified in the LeBlanc policy, whereas, it is qualified in the Capital City Press policy.

(b) In the rider or schedule attached to the policy issued by the appellant it is provided that "The insurance applies only to the use, by any person of any automobile or motorcycle, of the private passenger type, in the business of the **named assured** as expressed in the declarations (newspaper business), and to the use in such business by any employee of the named assured, of any automobile of the commercial type if such use is occasional and infrequent." The Fifth Circuit Court having held that Ewell was an independent contractor, how can it be successfully argued that either Ewell or Neyland was using Ewell's car "In the business of the named assured (Capital City Press) as expressed in the declaration"?

(c) In the *LeBlanc Case* it was contended that the effect of the rider was to restrict the coverage of the policy to Cottam & Company only, but the Court held that **"the only effect is to change the coverage of the policy from the automobiles of Cottam & Company to those owned by its employees mentioned in the schedule attached to the policy** and to restrict the coverage to the business use of the automobiles. In other words, the so-called omnibus clause appearing in the original policy is modified to that extent **and the policy, as affected by**

the rider, does not cover any person using the various automobiles, but only those mentioned in the schedule. It does not extend to persons using the automobiles with the permission of the insured, the named insured or the unqualified insured, but it does cover each of the seventeen". 13 So. (2d) 247, 248. (Emphasis ours.) **Robert Neyland, the driver of the car involved in this accident, was not one of the persons named in the schedule attached to the policy. Hence, even if we concede that the policy covered the independent contractor, Ewell, (which we do not) under the decision relied upon by the plaintiffs, Neyland, the driver, not being mentioned in the schedule, was not protected by, and was not insured under, the policy.**

(d) In the *LeBlanc Case* each of the seventeen salesmen mentioned in the schedule was required to pay to the Cottam Company his pro rata part of the premium on the insurance policy, whereas, in this case the Capital City Press paid the entire premium due under the policy issued by the appellant."

(4) What the Louisiana Supreme Court said with reference to the coverage was dictum, because, as stated supra, it was conceded that at the time of the accident LeBlanc was using his automobile on business for the Cottam Company.

For the foregoing reasons we submit that the Court of Appeals for the Fifth Circuit was correct in refusing to reopen this case on the ground that the *LeBlanc case* changed the jurisprudence of Louisiana.

For the reasons stated in our petition for certiorari and brief in support thereof, we also submit that when the Court of Appeals for the Fifth Circuit held that "The motion of defendant-appellant (Great American Indemnity Company) for a verdict in its favor should have

been granted" and remanded the case to the District Court "for further and not inconsistent proceedings," it was the ministerial duty of the District Judge to grant petitioner's motion for a directed verdict and enter judgment in its favor, and the Fifth Circuit Court was in error in remanding this appeal to the District Court for further proceedings.

Respectfully submitted,

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